Supreme Court, U.S.
FILED

97 1185 JAN 15 1998

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD T. STROTHER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: January 14, 1998

37 pp

QUESTIONS PRESENTED

1. Whether a jury instruction that (a) fails to define reasonable doubt with the classic "hesitate to act" language; (b) states that reasonable doubt and the presumption of innocence are "designed to protect the innocent and not the guilty"; and (c) defines proof beyond a reasonable doubt as evidence that leaves the jury "firmly convinced of the defendant's guilt," with acquittal only upon the jury finding "a real possibility that he's not guilty" permits a conviction on a lesser standard than due process requires.

2. Whether, under the plain error standard articulated by this Court in United States v. Olano, a finding of "obvious" error is required when the error is a constitutionally deficient reasonable doubt instruction.

3. Whether this Court should exercise its supervisory power over the federal courts by promulgating a standard reasonable doubt instruction to ensure that trial courts avoid defining the applicable standard in contravention of due process principles.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the District Court and the Court of Appeals for the Second Circuit were the United States of America and Richard T. Strother ("Strother" or "Petitioner").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION AND FEDERAL RULE 2

STATEMENT OF THE CASE 3

A. Proceedings in the District Court 5

1. The Indictment and Trial 5
2. The Court's Instructions 6

B. The Appeal 7

REASONS FOR GRANTING THE WRIT 9

I. The jury instruction explained the concepts of reasonable doubt and the presumption of innocence in a manner that permitted a conviction on a lesser standard than the Due Process Clause requires. 8

II. Under the plain error standard set forth in United States v. Olano, a finding of obviousness is not required when the error is a constitutionally deficient reasonable doubt instruction. 12

III. Pursuant to its supervisory powers over the federal courts, this Court should promulgate a standard reasonable doubt charge for use by trial courts. 16

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Cage v. Louisiana, 498 U.S. 39 (1990) 9

Gomila v. United States, 146 F.2d 372 (5th Cir. 1944) 12

Jackson v. Virginia, 443 U.S. 307 (1979) 17

Moffitt v. United States, 154 F.2d 402 (10th Cir. 1946) 12

Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956) 12

State v. Medina, 147 N.J. 43, 685 A.2d 1242 (1996) 18

Sullivan v. Louisiana, 508 U.S. 275 (1993) 4, 9, 13, 14

United States v. Birbal, 62 F.3d 456 (2d Cir. 1995) 15, 16

United States v. Bridges, 499 F.2d 179 (7th Cir. 1974) 12

United States v. Ciak, 102 F.3d 38 (2d Cir. 1996) 7, 8

United States v. Colon-Pagan, 1 F.3d 80 (1st Cir. 1993) 14, 15

United States v. Debilac, 925 F.2d 610
(2d Cir. 1991) 8

United States v. Doyle, Dkt. No. 96-1542,
slip. op. 7547, 7576, 1997 U.S. App.
LEXIS 34078 (2d Cir. Dec. 4, 1997) 12, 15

United States v. Floresca, 38 F.3d 706
(4th Cir. 1994) 16

United States v. Gatzonis, 805 F.2d 72
(2d Cir. 1986) 10

United States v. McBride, 786 F.2d 45
(2d Cir. 1986) 10

United States v. Merlos, 8 F.3d 48 (D.C. Cir. 1993),
cert denied, 511 U.S. 1064 (1994) 14,16

United States v. Olano, 507 U.S. 725 ..... 4, 13, 14, 15

United States v. Porter, 821 F.2d 968
(4th Cir. 1987) 10

United States v. Reese, 33 F.3d 166
(2d Cir. 1994) 10

Victor v. Nebraska, 511 U.S. 1 (1994) 4, 5, 8, 10,
..... 11, 13, 16, 17, 18

In Re Winship, 397 U.S. 358 (1970) 9

FEDERAL STATUTES

18 U.S.C. § 1344(2) 5,6

27 U.S.C. § 1254(1) 2

Fed. R. Crim. P. 52(b) 13,15

MISCELLANEOUS

2 Charles A. Wright, Federal Practice and Procedure §484, at 699-701 (2d ed. 1982) 13

Federal Judicial Center, Pattern Criminal Jury Instructions § 21, p 10

J. Newman, Beyond "Reasonable Doubt", 68 N.Y.U. L. Rev. 979, 982-83, 991 (1993) 11

1 Sand, Modern Federal Jury Instructions ¶ 4:01, at 4-14 11

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

RICHARD T. STROTHER,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Petitioner Richard T. Strother respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Second Circuit, entered on October 17, 1997, which affirmed petitioner's judgment of conviction.

OPINION BELOW

The Summary Order (per Oakes, J.,Walker, J., and Real, J. (United States District Court for the Central District of California, sitting by designation)) of the Court of Appeals for the Second Circuit is not published in the Federal Reporter. It is reprinted in the Appendix to this petition, *infra*, 1a-8a.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, of which review is sought, was entered on October 17, 1997. That decision affirmed the judgment of conviction entered in the United States District Court for the District of Connecticut. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 27 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE

U.S. CONST. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

This case raises a significant issue that goes to the very core concepts of our criminal justice system: proof beyond a reasonable doubt and the presumption of innocence. The judgment should be reversed because the preliminary and final charges to the jury on these key issues were fatally flawed in several significant respects.

First, the instructions failed to include the classic "hesitate to act" standard, which this Court has endorsed and encouraged district courts to use. Second, the District Court instructed the jury that the presumption of innocence and the reasonable doubt standard were rules of law "designed to protect the innocent and not the guilty." The permissibility of this instruction has divided those federal circuits that have considered it. Third, the District Court twice defined reasonable doubt as evidence that leaves the "jury firmly convinced of the defendant's guilt," with acquittal possible only upon a finding of "a real possibility that he's not guilty." This instruction impermissibly shifted the burden of proof to Strother to show "a real possibility that he's not guilty." It is an instruction the permissibility of which has likewise divided the federal circuits that have considered it.

This case also presents the Court with the opportunity to resolve a question that remains open following Sullivan v. Louisiana, 508 U.S. 275 (1993), and Victor v. Nebraska, 511 U.S. 1 (1994): whether a finding of "obvious" error, pursuant to this Court's plain error standard in United States v. Olano, 507 U.S. 725, is required in order to reverse a conviction when the error is a constitutionally deficient reasonable doubt instruction. Since Sullivan and Victor, the law is clear that the "substantial rights" prong of plain-error and harmless-error analysis is subsumed into a single inquiry concerning the "reasonable likelihood" that the jury misunderstood the instructions on the government's burden of proof, with prejudice presumed upon such a finding. Neither Sullivan nor Victor addressed whether in a plain error context "obviousness" must also be presumed. In this case, this analysis is relevant to one of the three asserted infirmities in the reasonable doubt instruction: the court's statement that the rules regarding reasonable doubt and the presumption of innocence were "designed to protect the innocent and not the guilty."

More particularly, this case presents the Court with the opportunity to exercise its supervisory power to mandate that district courts give a standard, error-free reasonable doubt charge as formulated by the Court. The time has long since passed for this issue to be resolved once and for all. The Court's exercise of its supervisory power in this regard would ensure equal justice throughout the federal system and would eliminate needless litigation on a concept that should be well-settled at this point in history.

This Court in Victor v. Nebraska noted in analyzing a reasonable doubt instruction that it was constrained by the fact that "we have no supervisory power over the state courts," 511 U.S. at 17. No such constraints prevent this Court from exercising its supervisory power to ensure that federal trial courts avoid defining reasonable doubt in a manner that permits a conviction on a lesser standard than due process requires.

A. Proceedings in the District Court

1. The Indictment and Trial

After a four-day trial before the Honorable Alfred V. Covello in the United States District Court for the District of Connecticut, a jury found Richard T. Strother guilty on a one-count indictment charging him with obtaining funds from a financial institution by means of false or fraudulent pretenses, representations or promises, in violation of 18 U.S.C. § 1344(2). The central question at trial was why Christine Wollschleager, a branch employee at Connecticut Bank and Trust ("CBT"), authorized payment of an $82,500 check drawn on Strother's account at CBT despite the lack of sufficient available funds in that account.

The government charged that Strother, a lawyer and businessman, in a single phone conversation with Wollschleager, asked her to pay the check and persuaded her to do so with a false promise that he would provide covering funds. The defense theory was that Wollschleager paid the check not because Strother had asked or made a promise but because of her mistaken belief that covering funds had been wired to Strother's account.

Although the government's proof included a series of checks drawn on insufficient available funds at three separate banks, the case against Strother turned on a single telephone conversation. The government charged that Strother had induced CBT's employee, Wollschleager, to authorize payment of a single CBT check through a single false oral representation. As the indictment specified in paragraph 5:

> (f) On or about Friday, June 9, 1989, the Defendant, Richard T. Strother, called [CBT] to advise that he had written a check for $82,500 on his [CBT] account in the name of Strother Film Partners I; that he had insufficient funds in that

account to cover the check; and that he would provide funds to cover the check.

(g) On or about Friday, June 9, 1989, the Defendant, Richard T. Strother, asked [CBT] to cover check number 180 for $82,500.

This crucial phone call, under the government's chosen theory, constituted the indictable offense under 18 U.S.C. § 1344(2).

2. The Court's Instructions

Covering just sixteen pages of transcript, the District Court's jury charge encompassed several reversible errors.

In preliminary instructions at the outset of trial, the District Court defined proof beyond a reasonable doubt as "proof that leaves you firmly convinced of the defendant's guilt," adding that the jury must acquit "[i]f ... you think there's a real possibility that he is not guilty." The District Court repeated this definition of reasonable doubt in the jury charge. Near the end of the charge, after reminding the jury of the presumption of innocence and the reasonable doubt standard, the Court further instructed: "You must keep in mind that those rules of law are designed to protect the innocent and not the guilty." The defense twice objected to the reasonable doubt instructions and explicitly requested "the concept of hesitate to act," a "classic part of that charge."

There can be no question that the District Court was alerted to the defendant's concerns regarding the defective instructions or that the court was determined to use its instruction regardless of the defense position. Responding to an objection to the preliminary charge to the jury, the District Court stated:

The proof beyond a reasonable doubt definition is one that I was alerted to at a symposium on that very

subject that was chaired by Chief Judge Newman of the Second Circuit.

Thereafter, in a concurring opinion of the Supreme Court, that precise charge was specifically affirmed.

B. The Appeal

On appeal, the Court of Appeals rejected the contention that the District Court's instruction on reasonable doubt was fatally flawed. The Court's discussion of this point is set forth in its entirety:

> The defendant also contends that the district court incorrectly charged the jury on reasonable doubt. However, this court upheld a similar jury charge, likewise specifically unobjected to, in United States v. Ciak saying that there was "no error, much less plain error in the district court's use of the language at issue in its jury charge." United States v. Ciak, 102 F.3d 38, 46 (2d Cir. 1996). In addition, as in Ciak, any harm from the charge was mitigated by the warnings at the beginning and end of the jury charge that there is a presumption of innocence and that the government must prove the defendant's guilt.

The panel's reliance on Ciak was misplaced in two significant respects. First, the District Court's charge glaringly omitted the classic "hesitate to act" language - an issue not raised in Ciak. Second, the Ciak charge was not objected to. Here, although the panel relied on the purported failure to object as an expedient to affirming a deficient reasonable doubt charge, the record simply does not support such a finding. Thus, the panel's description of Ciak as a case in which "this court upheld a similar jury charge, likewise specifically unobjected to," is doubly flawed and plainly wrong. In short, Ciak provides an inadequate basis for approving a charge that impermissibly trivialized the appropriate burden of

proof and diluted the standard by which the defendant's fate was to be determined. Indeed, Ciak was a case in which the Court's final charge to the jury "explained the reasonable doubt standard using language that the defendant concedes was proper." Ciak, 102 F.3d at 46. Here, quite to the contrary, the defense vigorously contested the District Court's charge to the jury each time it was given, both before and after the presentation of evidence -- a point missed by the panel's opinion.

In particular, defense counsel twice objected to the failure to instruct the jury pursuant to the standard formulation that reasonable doubt means that "a reasonable person would not hesitate to rely and act" upon the evidence presented "in the most important of his affairs." United States v. Debilac, 925 F.2d 610, 614 (2d Cir. 1991). Indeed, it was the inclusion of the "hesitate to act" formulation that saved the charge from reversal by this Court in Victor v. Nebraska, 511 U.S. 1 (1994).

Here, though the panel failed to address it in its summary order, the charge did not include this "repeatedly approved" "common-sense benchmark," notwithstanding specific objections to this deficiency. Moreover, here, the charge was further flawed by two other clearly disfavored instructions relating to reasonable doubt. The combined effect of these errors was to define reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.

REASONS FOR GRANTING THE WRIT

I. The jury instruction explained the concepts of reasonable doubt and the presumption of innocence in a manner that permitted a conviction on a lesser standard than the Due Process Clause requires.

The principle that the Government has the burden of proving a defendant guilty beyond a reasonable doubt derives from the Due

Process Clause. In Re Winship, 397 U.S. 358, 361-64 (1970). "The standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895). Reasonable doubt jury instructions that appropriately convey Winship concepts are critical to the constitutionality of a conviction. See, e.g., Cage v. Louisiana, 498 U.S. 39 (1990). The jury instruction in this case was fatally flawed because it failed to adequately inform the jury of the law, raising a reasonable likelihood that the jury misinterpreted the reasonable doubt instruction and understood the instructions to allow conviction based on insufficient proof. As Justice Scalia stated for the Court in Sullivan v. Louisiana, 508 U.S. 275, 278-82, error in this essential instruction is per se harmful and must result in the reversal of a conviction.

Courts have continuously cautioned trial judges to use the standard charges found in well-accepted texts, see United States v. Gatzonis, 805 F.2d 72, 74 (2d Cir. 1986) ("trial judges 'would be exceedingly well advised to use'" the charge found in 1 Devitt & Blackmar, Federal Jury Practice and Instructions). Venturing far from this standard charge, the District Court's explanation of the principles of reasonable doubt and the presumption of innocence eased the Government's burden of proof in three ways.

First, the charge failed to instruct the jurors that proof beyond a reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his affairs." 1 Devitt, Blackmar, et al. supra, at §12.10 (4th ed.) It is a formulation this Court has repeatedly approved. Victor v. Nebraska, 511 U.S. at 20.

Second, the District Court twice defined proof beyond a reasonable doubt as evidence that leaves the jury "firmly convinced of the defendant's guilt," with acquittal only upon the jury finding

"a real possibility that he's not guilty." Courts have repeatedly cautioned against this precise language since it "may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986); see United States v. Reese, 33 F.3d 166, 172 (2d Cir. 1994) (with hesitate-to-act language elsewhere included, use of "the potentially confusing 'real possibility' language" was not plain error). "Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed innocent." United States v. Porter, 821 F.2d 968, 972 (4th Cir. 1987).

The ultimate source of this formulation is a pattern instruction from Federal Judicial Center, Pattern Criminal Jury Instructions § 21, p. 28 (1982). Significantly, the Judicial Center's own commentary "caution[s] that this language might not be acceptable in many circuits." 1 Sand, Modern Federal Jury Instructions ¶ 4:01, at 4-14.

The District Court noted that its reasonable doubt definition came from "a symposium on that very subject that was chaired by Chief Judge Newman of the Second Circuit." However, in his Madison Lecture, Chief Judge Newman (1) acknowledged that the hesitate-to-act formulation is "[t]he most widely used explanation, especially favored in most federal courts"; (2) remarked that "as a district judge, I dutifully repeated" the hesitate-to-act language; (3) argued only for the "firmly convinced" language (not the troublesome "real possibility" language); and (4) conceded that his preferred phrasing "has not been widely adopted." J. Newman, Beyond "Reasonable Doubt", 68 N.Y.U. L. Rev. 979, 982-83, 991 (1993).

The District Court defended its definition by claiming that "in a concurring opinion of the Supreme Court, that precise charge was specifically affirmed." But none of Justice Ginsburg's colleagues joined her concurrence sponsoring the charge employed by the

District Court. Victor v. Nebraska, 511 U.S. at 25 (Ginsburg, J., concurring). Indeed, the opinion of the Court in Victor concluded that "the hesitate to act standard gives a common-sense benchmark for just how substantial such a doubt must be." Id. at 20-21.

Third, the District Court told the jury that, when considering the rules concerning reasonable doubt and the presumption of innocence, the jury "must keep in mind that those rules of law are designed to protect the innocent and not the guilty." It is plain that the instruction given by the court incorrectly stated both the reasonable doubt standard and the presumption of innocence. Indeed, the Court of Appeals for the Second Circuit recently found in another case that "the charge in its entirety created more than a possibility of jury misinterpretation and risked the factual error and unjust conviction against which Winship warned," holding that it created a reasonable likelihood that the jury misunderstood the reasonable doubt standard and the presumption of innocence. United States v. Doyle, Dkt. No. 96-1542, Slip. Op. 7547, 7579, 1997 U.S. App LEXIS 34078 (2d Cir. Dec. 4, 1997).

Not all circuits appear to be in accord with this conclusion. There is one circuit opinion that wholeheartedly approved an instruction like the one in this case. In [illegible]fitt v. United States, 154 F.2d 402 (10th Cir. 1946), the Tenth Circuit reviewed an instruction which stated that the [illegible]mption of innocence was "'not intended to shield those who are actually guilty from just punishment, but is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime.'" Id. at 404-05. The court found that "[t]here is ...nothing in this instruction from which it could be inferred that the presumption does not go with the guilty defendant as well as the innocent," id. at 405.

The great weight of authority is to the contrary. See Gomila v. United States, 146 F.2d 372, 373 (5th Cir. 1944) ("presumption of innocence applies alike to the guilty and to the innocent");

Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956) (prejudicial error to instruct that presumption of innocence was "intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty"); United States v. Bridges, 499 F.2d 179, 186 (7th Cir. 1974) (reversible error to charge that term reasonable doubt "is not for the purpose of permitting guilty men to escape, but it is a rule for the protection of the innocent").

It cannot be gainsaid that the presumption of innocence and the reasonable-doubt standard apply to all criminal defendants without regard to their actual guilt or innocence. The instruction given by the court in this case incorrectly states both the reasonable doubt standard and the presumption of innocence. Because there is a reasonable likelihood that the combination of errors in the charge led the jury to understand the instructions "to allow conviction based on proof insufficient to meet the Winship standard." Victor v. Nebraska, 511 U.S. 1, 6, Strother's conviction must be reversed. Sullivan v. Louisiana, 508 U.S. 275, 278-82 (1993).

II. Under the plain error standard set forth in United States v. Olano, a finding of obviousness is not required when the error is a constitutionally deficient reasonable doubt instruction.

In affirming Strother's conviction, the Court of Appeals appeared to employ the plain error standard of Fed. R. Crim. P. 52(b). In view of counsel's objection to the reasonable doubt charge, the court's awareness of the defendant's position, and the court's apparent steadfast adherence to its instruction of choice, application of that standard was unwarranted. See 2 Charles A. Wright, Federal Practice and Procedure §484, at 699-701 (2d ed. 1982) ("The requirement of objections should not be employed woodenly, but should be applied where its application will serve the

ends for which it was designed, rather than being made into a trap for the unwary.").

Regardless of its propriety, the court's use of the plain error standard raises a question that has divided those circuit courts that have considered it: whether, under the plain error standard articulated by this Court in United States v. Olano, 507 U.S. 725 (1993) (error must be "obvious" and "affect substantial rights" to constitute plain error), a finding of "obviousness" is required when the error is a constitutionally deficient reasonable doubt instruction.

In Olano, this Court set out the three-elements required to reverse a conviction under the plain error standard of Rule 52(b), Fed. R. Crim. P.: (1) there must be an "error," (2) it must be "clear" or "obvious"; and (3) it must "affec[t] substantial rights," which "in most cases ... means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." Id., 507 U.S. at 732-34. If an error meets these requirements, a court of appeals "has authority to order correction, but is not required to do so." Id. at 735. The applicable test is whether the error "'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Id. at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936). However, recent decisions of this Court, have altered the standard of review of reasonable-doubt instructions and their relation to the plain error rule.

In Sullivan v. Louisiana, 508 U.S. 275 (1993), this Court held that a constitutionally deficient reasonable doubt instruction can never be harmless error. Although Sullivan concerned harmless-error rather than plain error analysis, courts have held that its reasoning "applies with equal force in the plain error context." United States v. Merlos, 8 F.3d 48, 51 (D.C. Cir. 1993), cert denied, 511 U.S. 1064 (1994); see also United States v. Colon-Pagan, 1 F.3d 80, 81-82 (1st Cir. 1993) (Breyer, J.) (applying Sullivan to plain error case).

Thus, where a jury instruction on reasonable doubt is constitutionally deficient, prejudice may be presumed, without an assessment whether the instruction affected the outcome of the trial. It may also be presumed that the erroneous instruction "'seriously affected the fairness, integrity or public reputation of judicial proceedings,'" as a constitutionally deficient reasonable doubt instruction is a "'structural defect[] in the constitution of the trial mechanism.'" Colon-Pagan, 1 F.3d at 82 (quoting Olano, 113 S.Ct. at 1779, and Sullivan, 113 S.Ct. at 2082).

The instruction given by the District Court in this case erroneously states both the reasonable doubt standard and the presumption of innocence. United States v. Doyle, Dkt. No. 96-1542, slip. op. 7547, 7576, 1997 U.S. App. LEXIS 34078 (2d Cir. Dec. 4, 1997). The only question that remains in this case, therefore, is whether the court's errors were "obvious" under the plain error rule, Fed. R. Crim. P. 52(b).

Although a finding of "obvious" error is generally required to reverse a conviction under Rule 52(b), see Olano, 507 U.S. at 734, "it is an open question, following Sullivan and Victor, whether this finding of 'obviousness' is required when the error is a constitutionally deficient reasonable-doubt instruction." United States v. Birbal, 62 F.3d 456, 463 (2d Cir. 1995).

It is clear since Sullivan and Victor that the "substantial rights" prong of plain-error and harmless error analysis is subsumed into a single inquiry concerning the "reasonable likelihood" that the jury misunderstood the instructions on the government's burden of proof; if there is such a likelihood, prejudice is presumed and reversal must follow. But neither Sullivan (which concerned the harmless error standard) nor Victor addressed whether in a plain-error context "obviousness" must also be presumed.

The "apparent context" of Victor has led the Court of Appeals for the Second Circuit to conclude that this Court

interpreted its "reasonable likelihood" inquiry "as encompassing not only the 'prejudice' prong of Olano's plain error review but also the requirement of 'obviousness.'" United States v. Birbal, 62 F.3d at 456. The "apparent context" of Victor, according to the court, was plain error review, as Victor had failed to object to the instruction at trial or to raise the issue on direct appeal. 511 U.S. ___ at 19. Nonetheless, this Court employed the "reasonable likelihood" test without ever mentioning "obvious error." Id. at 6.

Other circuits appear to be in conflict with this view. See United States v. Floresca, 38 F.3d 706, 712 (4th Cir. 1994) (in banc) ("[i]t is an open question as to whether the absence of an objection requires further analysis when the alleged error goes to the heart of the entire judicial process") United States v. Merlos, 8 F.3d at 51 (interpreting Sullivan (prior to Victor) as eliminating the requirement of prejudice but not of "obviousness").

It remains for this Court to clarify the law in light of its evolving analysis of the standard of review regarding constitutionally deficient reasonable doubt charges. Here, as in Victor, application of the reasonable likelihood test should subsume the obvious error prong of the plain error standard. The jury instruction in this case suffered from more numerous infirmities than that in Victor: (1) failure to include the classic "hesitate to act" language; (2) a definition or reasonable doubt as evidence that leaves the "jury firmly convinced of the defendant's guilt, with acquittal only upon a finding of a "real possibility that he's not guilty"; and (3) a statement that rules concerning reasonable doubt and presumption of innocence "are designed to protect the innocent and not the guilty.

It is this collection of related errors that distinguishes this charge from those upheld by this Court in Victor. But, here, unlike Victor, the instruction failed to include the classic "hesitate to act" language. Indeed, it was the inclusion of the "hesitate to act" formulation that saved the charge from reversal by the Supreme

Court in Victor v. Nebraska. In Victor, this Court held that an instruction challenged as defective in two instances was salvaged in each instance by an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. 511 U.S. at 21. Because "the hesitate to act standard gives a common-sense benchmark," id at 20 for defining reasonable doubt, the Court found that "the instructions correctly conveyed the concept of reasonable doubt to the jury." Id. at 21.

Here, though the Court of Appeals failed to address it in its summary order, the charge did not include this "repeatedly approved" "common-sense benchmark," notwithstanding specific objections to this deficiency. Moreover, here, the charge was further flawed by two other clearly disfavored instructions relating to reasonable doubt. The combined effect of these errors was to define reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires. Under these circumstances the conviction cannot stand.

III. Pursuant to its supervisory powers over the federal courts, this Court should promulgate a standard reasonable doubt charge for use by trial courts.

This Court has held that the Constitution requires a court to instruct the jury on the reasonable doubt standard. Victor v. Nebraska, 511 U.S. at 5; Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979). This Court has not mandated, however, that trial courts employ any particular set of words to convey the reasonable doubt concept to the jury. The time has come for the Court to do so.

Rather than parsing defective reasonable doubt charges for artificial distinctions, the time has come for this Court to exercise its supervisory power to mandate that district courts give a standard, error-free reasonable doubt charge as formulated by the

Court. The amount of process to which a defendant is due under the Due Process Clause should not vary from district to district or judge to judge, particularly on a matter as fundamental as proof beyond a reasonable doubt, the standard by which liberty is deprived. It is truly remarkable that at this stage of our history courts are still grappling not infrequently with an issue as basic as this. The solution is simple and not without precedent.

Recently, the Supreme Court of New Jersey, faced with the continuing task of reviewing convictions that are challenged because of jury instructions that misstate or dilute the prosecution's burden to prove guilt beyond a reasonable doubt, adopted a definition and directed "trial courts not to deviate from the definition." State v. Medina, 147 N.J. 43, 61, 685 A.2d 1242, 1252 (1996).

In Victor v. Nebraska, this Court noted that it was constrained by the fact that "we have no supervisory power over the state courts," 511 U.S. at 17. No such constraints prevent this Court from exercising its supervisory power to ensure that federal trial courts avoid defining reasonable doubt in a manner that permits a conviction on a lesser standard than due process requires.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: January 14, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of October, one thousand nine hundred and ninety-seven.

PRESENT:

Hon. James L. Oakes,
Hon. John M. Walker, Jr.,

Circuit Judges,

Hon. Manuel L. Real,*

District Judge

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* The Honorable Manuel L. Real of The United States District Court for the Central District of California, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD T. STROTHER,

Defendant-Appellant.

APPEARING FOR
APPELLEE: MARK G. CALIFANO
ASSISTANT U.S. ATTORNEY
DISTRICT OF CONNECTICUT
NEW HAVEN, CONNECTICUT

APPEARING FOR
APPELLANT: BARRY A. BOHRER
MORVILLO, ABRAMOWITZ,
GRAND, IASON & SILBERBERG
NEW YORK, NEW YORK

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Covello, J.), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is hereby **AFFIRMED.**

Defendant Richard T. Strother was initially found guilty of obtaining funds from a financial institution by means of false pretenses in violation of 18 U.S.C. §1344. On appeal Strother's conviction was reversed and the case remanded for a new trial. See United States v. Strother, 49 F.3d 869 (2d Cir. 1995). On retrial, Strother was again convicted by a jury of bank fraud and on November 12, 1996, was sentenced to 8 months and three weeks imprisonment. This appeal followed.

Defendant first contends that the district court erred in numerous evidentiary rulings during trial. A district court's evidentiary rulings are reviewed by this court only for an abuse of discretion. United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990). We will "not overturn a trial judge's evidentiary rulings unless the judge acted arbitrarily or irrationally." United States v. Blanco, 861 F.2d 773, 781 (2d Cir. 1988).

Strother argues that the district court erroneously allowed Agent Stone to draw conclusions from other witnesses' testimony. We agree with the defendant that "witnesses may not opine to the credibility of the testimony of other witnesses at the trial," United States v. Forrester, 60 F.3d 52, 63 (2d Cir. 1995), and that the court improperly allowed Agent Stone to credit the testimony of other witnesses. Nevertheless, we conclude that this does not constitute a ground for reversal since the erroneous admission of

evidence is subject to harmless error analysis. See, e.g., United States v. Harwood, 998 F.2d 91, 99 (2d Cir. 1993). Since we conclude "with fair assurance" that the admission of this testimony "did not substantially influence the jury," United States v. Rea, 958 F.2d 1206, 1220 (2d Cir. 1992), we will not reverse on this ground.

Strother next contends that the district court erred in precluding the defendant from using the charge off memo as a prior inconsistent statement to impeach Woodruff and in refusing to admit the redacted portion. We disagree. The district court did not abuse its discretion in preventing Strother from introducing the charge off memo since Woodruff did not adopt the memorandum as her own, United States v. Strother, 49 F.3d 869, 875 (2d Cir. 1995). It was not an abuse of discretion for the district court to bar Strother's use of the memorandum for impeachment purposes on the basis that Woodruff's signature was not near the relevant text and she, as well as several other people, signed the document in order to approve a charge off and not to indicate her agreement with or the accuracy of the statements in the memo.

Finally, the defendant challenges the district court's admission of two prior consistent statements. Both parties agree that in order to introduce statements to rebut a charge of recent fabrication or improper motive the declarant's consistent statements must be made before the charged recent fabrication. Fed. R. Evid. 801(d)(1)(B). In this case the parties dispute when Wollschleager's motive to blame Strother arose. The district court did not abuse its discretion in finding that Wollschleager had no motive to lie until June 19th, after the prior statements were made, since she said she was not concerned about losing her job until this date and up until this point she still believed Strother was going to cover the check. See Joint Appendix at 120.

Defendant next argues that his conviction is not supported by the evidence. In challenging the sufficiency of the evidence the defendant bears a heavy burden. United States v. Sureff, 15 F.3d

225, 228 (2d Cir. 1994). In order to prevail, the defendant must establish that the evidence, viewed in the light most favorable to the government, is insufficient to convince any rational fact finder that he is guilty beyond a reasonable doubt. United States v. Simon, 85 F.3d 906, 908 (2d Cir.), cert; denied, 117 S.Ct. 517 (1996). The defendant was unable to meet this burden in the present case.

In order to be convicted under the bank fraud statute this court held that it was necessary to prove that (1) Connecticut Bank and Trust ("CBT") was a federally insured financial institution at the time the offense occurred (2) the defendant knowingly carried out a scheme to obtain money by false or fraudulent pretenses, representations, or promises and (3) the defendant knowingly and willfully executed the scheme with intent to defraud the bank. United States v. Strother, 101 F.3d 108, **2 (2d Cir. 1996); 18 U.S.C. §1344(a)(2).

The parties stipulated that CBT was a federally insured financial institution at the time of the charged offense. We agree with the government that there was sufficient evidence to establish the two remaining elements of bank fraud. It is clear that Strother wrote a CBT check on June 5, 1989 for $82,500 and that there were insufficient funds to cover the check. It is also undisputed that CBT paid the check and that Strother never covered the check. In addition, the government presented evidence that the defendant wrote worthless checks to induce CBT to pay the $82,500 check.

The government also introduced evidence showing that the defendant made false statements and representations to bank officials and government agents. Chris Wollschleager, a bank representative testified that Strother told her he "was trying to get over to the bank to make a wire, to do a wire to cover it, but if it did not happen, if I could please cover the check for him." See Joint Appendix at 104. This statement plainly carried the false implication that he had sufficient funds to cover the check and that he just needed to wire the money into his account. Strother then

told CBT manager Rose Sbalcio that he would fund his Citibank account by June 21, 1989, but he never made this transaction. See Joint Appendix at 67. Finally, Strother repeatedly made false exculpatory statements. See Joint Appendix at 265-266e.

The appellant, in challenging the sufficiency of the evidence, has not bourne his "heavy burden." There is sufficient evidence upon which a jury could base a finding of bank fraud.

The defendant also contends that the district court incorrectly charged the jury on reasonable doubt. However, this court upheld a similar jury charge, likewise specifically unobjected to, in United States v. Ciak saying that there was "no error, much less plain error in the district court's use of the language at issue in its jury charge." United States v. Ciak, 102 F.3d 38, 46 (2d Cir. 1996). In addition, as in Ciak, any harm from the charge was mitigated by the warnings at the beginning and end of the jury charge that there is a presumption of innocence and that the government must prove the defendant's guilt.

Similarly, the defendant argues that the district court's instructions constitute reversible error. We disagree. First, the defendant argues that the instruction about Strother's statements to CBT was erroneous.** However, the charge appropriately

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** The defendant objected to the following instruction:

> The presentation to a bank of one or more checks drawn on insufficient funds does not in and of itself constitute false or fraudulent pretenses, representations, or promises. You should, however, consider the matter of these checks to determine whether they together with

precluded the jury from finding that merely using worthless checks is sufficient to warrant a conviction of bank fraud and correctly articulated the need for an "embellished" check kiting scheme. United States v. Burnett, 10 F.3d 74 (2d Cir. 1993). The defendant next contends that the district court erred in its omission of an instruction that the jury should consider evidence of Wollschleager's negligence. However, the absence of a specific instruction on this issue is not reversible error since it is clear that the jury was told to evaluate the credibility and biases of the witnesses which includes negligence. Third, the defendant argues that the district court erred in its charge on false exculpatory statements. This claim lacks merit since this court upheld this exact instruction in a previous appeal of this case. United States v. Strother, 49 F.3d 869, 877 (2d Cir. 1995).

The defendant also challenges the grand jury proceedings in this case. Strother claims that there was defective grand jury presentation since there was only a single witness and (1) he did not testify about the call on which the charge was based; (2) the grand jury was not told about Wollschleager's prior inconsistent statements or her errors in paying the check and (3) the grand jury was told that Strother's account of the phone call comported with Christine Wollschleager's account.

Preliminarily, we note that the "social cost of dismissing an indictment because of an imperfect grand jury proceeding are simply too high to accept when the defendant has been convicted after a full and fair trial." United States v. Brito, 907 F.2d 392, 394 (2d Cir. 1990). Nevertheless, we would dismiss the indictment if

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> the statement made by Mr. Strother to Ms. Wollschleager, when taken in their totality, rise to the level of false or fraudulent pretenses, representations, or promises as I have just defined these terms for you.

the grand jury was misled. United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1983). However, we see no reason to dismiss the indictment in this case since there is no evidence that the jury was misinformed. A prosecutor does not need to present to the grand jury evidence which may negate a defendant's guilt. United States v. Casamento, 887 F.2d 1141, 1183 (2d Cir. 1989). Similarly, a grand jury proceeding is not defective for failing to present a government witness. Id. Unless the jury is not advised of its use or a grand jury would not indict without it, hearsay evidence is admissible in a grand jury proceeding. United States v. Ruggiero, 934 F.2d 440, 447 (2d Cir. 1991). Since the indictment was based on sufficient and competent evidence we will not dismiss the grand jury indictment.

Finally, Strother contends that the court erred in enhancing the defendant's sentence for "more than minimal planning" pursuant to U.S.S.G. § 2F1.1(b)(2)(A), on the ground that he concealed his fraudulent activity. The defendant relies on United States v. Bean which held that writing checks to cover a check with insufficient funds does not constitute concealment since writing checks is the means by which the fraud succeeds. United States v. Bean, 18 F.3d 1367 (7th Cir. 1994). In support of his argument Strother contends that the district court relied only on the presentence report. However, the district court noted that the upward departure for more than minimal planning was based on the "totality of the circumstances." See Government Appendix at 220-21. Unlike Bean this case was not a simple check kiting scheme. In addition to writing checks on insufficient funds, Strother called bank officials and told them he was wiring a check, then he stalled them by promising he was going to fund his account, and he continuously made false exculpatory statements. We review an enhancement for "more than minimal planning" for clear error only, United States v. Walsh, 119 F.3d 115, 119 (2d Cir. 1997), and find that there was no clear error in this case.

We have considered all of defendant's other arguments not specifically addressed and find them to be without merit. Accordingly, the judgment of the United States District Court for the District of Connecticut is AFFIRMED.

FOR THE COURT,

/s/_____
GEORGE LANGE III, Clerk
by: Lucille Carr, Deputy Clerk